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No. 84-6859

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

RONALD DERAY SKIPPER,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

On Writ Of Certiorari To
The Supreme Court Of South Carolina

BRIEF FOR PETITIONER

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QUESTION PRESENTED

In this capital case, did the exclusion of mitigating evidence tending to show that petitioner would probably make a favorable adjustment to prison if his life was spared violate petitioner's rights under *Lockett* v. *Ohio* and *Eddings* v. *Oklahoma*?

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CITATION TO OPINION BELOW

The opinion of the Supreme Court of South Carolina is reported as *State* v. *Skipper*, ___ S.C. ___, 328 S.E.2d 58 (1985), and is reproduced in the Joint Appendix [J.A.] at 15-23. The *per curiam* order of the Supreme Court of South Carolina dated April 3, 1985, denying petitioner's timely petition for rehearing is unreported, and is reproduced at J.A. 24.

JURISDICTION

The jurisdiction of this Court rests upon 28 U.S.C. § 1257(3), petitioner having asserted below and asserting here a deprivation of rights secured by the Constitution of the United States.

The judgment of the South Carolina Supreme Court was entered on February 12, 1985. A timely petition for rehearing was denied by that court on April 3, 1985. The petition for certiorari was filed on June 3, 1985, and was granted on October 15, 1985.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the eighth amendment to the Constitution of the United States, which provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

It further involves the fourteenth amendment to the Constitution of the United States, which provides in pertinent part:

> "[N]or shall any state deprive any person of life . . . without due process of law . . ."

This case also involves S.C. Code §§ 16-3-20 *et seq.* (1984) which provide in pertinent part:

> § 16-3-20 (A) A person who is convicted or pleads guilty to murder shall be punished by death or by imprisonment for life . . .
>
> (B) Upon conviction . . . of murder, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or to life imprisonment. . . . In the sentencing proceeding, the jury or judge shall hear additional evidence in extenuation, mitigation or aggravation of punishment. . . .
>
> (C) The judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances otherwise authorized or allowed by law and any . . . statutory aggravating and mitigating circumstances which may be supported by the evidence. . . .

STATEMENT OF THE CASE

As summarized by the South Carolina Supreme Court, the facts of the crime for which petitioner Ronald DeRay Skipper was convicted and sentenced to death are as follows:

> On the evening of November 1, 1982, Maryanne Wray (victim) went with two friends to the Rainy Day Inn in Garden City. Around 11:00 p.m. she left with Appellant, telling her friends that they were going to the beach. Later, her friends saw Appellant and the victim on the beach, embracing. When she did not return to the Inn, the friends left around 2:00 a.m.
>
> The victim's body was found the next morning at a house near the Garden City pier; she had been strangled.

State v. *Skipper*, ___ S.C. ___, 328 S.E.2d 58, 59 (1985), J.A. 15-16.

Following discovery of Ms. Wray's body, witnesses identified Skipper as the person seen kissing her on the beach shortly before her disappearance. *State* v. *Skipper*, Transcript of Record (hereinafter cited as "Tr.") at 491, 772. He was arrested several days later and charged with her murder.

Skipper spent most of the next seven and a half months in the Horry County jail awaiting trial. His case was finally called for trial on June 20, 1983. He pled not guilty and was convicted by a jury of murder and first degree criminal sexual conduct.

Two days after the guilty verdicts were returned, a sentencing hearing was conducted before the trial jury pursuant to the provisions of S.C. Code § 16-3-20 (1984 Cum. Supp.) for the purpose of determining whether petitioner should be sentenced to life imprisonment or to death by electrocution. Immediately before the beginning of the testimony at the sentencing hearing, the trial judge asked defense counsel to specify the statutory mitigating circumstances on which Skipper relied.[1] Counsel

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[1] The South Carolina capital sentencing statute under which this case was tried is identical in almost all material respects to the Georgia statute considered in *Gregg* v. *Georgia*, 428 U.S. 153 (1976) and *Zant* v. *Stephens*, 462 U.S. 862 (1983). The only pertinent difference is that South Carolina's statute, unlike Georgia's, includes a list of nine statutory mitigating circumstances which are to be expressly called to the sentencer's attention when supported by the evidence. S.C. Code § 16-3-20(C)(b)(1)-(9) (1984). The sentencing jury may not, however, limit its consideration to these statutory mitigating circumstances, and must be instructed to consider any other mitigating circumstances "otherwise allowed or authorized by law." *State* v. *Copeland*, 278 S.C. 572, 300 S.E.2d 63 (1982), *cert. denied*, 460 U.S. 1103 (1983).

responded by stating, among other things, that

> [t]he general mitigating circumstances, of course, will be the biographical life of the defendant, his ability to be rehabilitated. In that regard we have subpoened two jail guards, and Mrs. Carolyn Henry who is a visitor in the jail on a regular basis, and has conferred with the defendant once a week since his confinement.

Counsel conceded at this juncture that certain decisions of the South Carolina Supreme Court had indicated that "the ability of the defendant to adjust to a life sentence or to extended confinement in custody . . . was not relevant."[2] As defense counsel began to explain his position with regard to this evidence, the trial judge stated that he would rule on the admissibility of the evidence at the proper time. J.A. at 3-4.

The prosecution then proceeded to introduce in aggravation of punishment evidence to show that petitioner had committed sexual assaults on other women prior to the murder of Ms. Wray. Tr. 1007-1022. After this evidence had been admitted, petitioner was afforded his opportunity to present evidence in mitigation.

The first witness to testify in mitigation was petitioner himself. While most of his testimony concerned his family

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[2] As will be discussed below in greater detail, the primary case to which counsel was referring was *State* v. *Koon*, 278 S.C. 578, 298 S.E.2d 769 (1982). In *Koon*, which was decided six months before petitioner's trial, the South Carolina Supreme Court upheld the exclusion (by the same trial judge as presided in petitioner's case) of mitigation testimony by a psychiatrist to the effect that the defendant would in all likelihood prove adaptable and nonviolent in prison if given a life sentence. *See Patterson* v. *South Carolina*, ____ U.S. ____, 105 S.Ct. 2056, 2057-2058 (1985) (Marshall, J., dissenting from denial of certiorari).

background and his problems with drugs, he did mention that he had been free of drugs since the beginning of his incarceration nearly eight months prior to the trial. He also stated that if he were given a life sentence rather than sentenced to death, he hoped that he would be able to work in prison and help support his family. J.A. 4-5. He admitted that, immediately after his arrest, he had had some disagreements with the jail authorities over his right to make phone calls and to have his personal belongings, but he asserted that after this initial period he had gotten along well with the custodial staff at the jail. J.A. 5-6. On cross-examination, the prosecutor concluded his questioning of petitioner with the following exchange:

> Q. You are the fellow that when you got to the Horry County jail went to kicking the cell, right?
>
> A. Yes, sir.
>
> Q. That's you. That's the kind of fellow you are, but you are nice today, right?
>
> A. (No response).
>
> MR. DUNN [prosecuting attorney]: I have no further questions.

J.A. 7.

Skipper's next witness in mitigation was his ex-wife, Pamela Anderson Skipper. Mrs. Skipper described the defendant as the product of a violent and turbulent home life, and related a history of drug and alcohol dependence and emotional disturbance. Tr. 1069-1093. She also testified that Ronald had told her of having been repeatedly raped in prison while serving a Youthful Offender sentence for statutory rape, and she described how he suffered from nightmares which appeared to stem from this experience. J.A. 8-9. Later in her testimony she re

counted her former husband's efforts to seek treatment for his psychiatric problems. Mrs. Skipper described Ronald as having been "upset" when he was first arrested for Ms. Wray's murder, and she recounted her unsuccessful efforts to visit him early in his incarceration. J.A. 9-10. At this juncture, the following exchange occurred:

> Q. [by Mr. Dusenbury, defense counsel]: Now, since that period when you and Ronny were upset, I ask you whether or not what type of adjustment he made to prison life?
>
> A. He has made a good adjustment.
>
> Q. What is your opinion as to whether or not he could be—
>
> MR. DUNN: Object to, "What is your opinion." It can't be relevant. She is not qualified as an expert of any kind.
>
> THE COURT: Mr. Dusenbury?
>
> MR. DUSENBURY: I think she is well qualified.
>
> THE COURT: Let's hear the rest of your question and then I will decide.
>
> Q. What is your opinion from your knowledge of Ronny and his reaction to authority under the present conditions, and under prison conditions over an extended period of time: what is your opinion as to whether he could make a good adjustment?
>
> THE COURT: Objection sustained.
>
> MR. DUSENBURY: Your Honor, we would like to take up a matter of law outside the presence of the jury.
>
> THE COURT: I refer you to the case of State against Koon. I am familiar with the law. . . .

(The following took place outside the presence of the jury).

THE COURT: In the case of State versus Koon it says, "Appellant next alleges that the trial court erred by excluding certain psychiatric evidence concerning his future adaptability to jail. We disagree. The penalty phase of a capital murder trial is concerned with the existence [or] nonexistence of mitigating or aggravating circumstances involved in or arising out of the murder, not the convicted murderer's adaptability to prison life."

MR. DUSENBURY: Your Honor, we have under subpoena two jailers, Mr. Fritz Collins, Mr. Ronny Johnson, and a regular visitor Carolyn Henry to testify that the defendant has made a good adjustment.

THE COURT: Whether he can or cannot, State versus Koon says it is not an issue in this case.

MR. DUSENBURY: Even if they state after this initial period he has made a good adjustment?

THE COURT: Read State versus Koon. That is not an issue, whether he can adjust or not adjust.

MR. DUSENBURY: So none of these witness[es] will be permitted to testify?

THE COURT: I don't know what they are going to say, but I am telling you they will not be permitted to testify about his adjustability to prison life.

MR. DUSENBURY: That is the only thing we would offer them for. Thank you, Your Honor.

THE COURT: Anything further?

MR. DUSENBURY: No, sir.

THE COURT: Give us the jury, please.

J.A. 10-12.

After this ruling excluding the testimony of Carolyn Henry and the jailers, Skipper called as witnesses in mitigation his mother, sister and grandmother. Their testimony consisted largely of descriptions of petitioner's traumatic childhood and adolescence in a home environment dominated by alcoholism and continuous domestic violence. Tr. 1113-1169. None of these witnesses testified concerning petitioner's conduct in jail during the preceding seven-and-a-half months, although his mother did state, as had petitioner, that he had been free of drugs since the start of his pretrial confinement. Tr. 1148. During the testimony of petitioner's grandmother, Hazel F. Oliver, petitioner's counsel acknowledged that the trial judge had "already ruled on adjustment," and when the trial judge confirmed this, counsel concluded his examination without asking the witness any questions concerning the defendant's adjustment to prison. J.A. 12-13. After these witnesses had testified, Skipper rested his case in mitigation. Tr. 1169.

In sum, the trial judge's ruling excluding the testimony of the two jail officers and Mrs. Henry prevented the jury from considering any favorable testimony concerning Skipper's conduct or adjustment in jail, with the exception of that of his ex-wife and of Skipper himself. With the record in this posture, the prosecutor, knowing that the trial judge had refused to permit the favorable testimony of three impartial witnesses on this point, made the following argument to the jury:

> What kind of fellow is he? He told you, not me, something about an unlawful weapon. He was the lookout man in a stealing case when he was very young. Been in trouble all his life in some way or other. His wife said he told her—I didn't hear anybody else say it. He told her . . . that he had been raped in prison. With his history and what you know

> about him, who do you think the raper was and who do you think the rapee was? And if given the opportunity again with this four time sexual abusing loser, who do you think will get raped in prison? Will it be Ronald Skipper, big old Ronald Skipper who knocks woman [sic] in the side of the head, or will it be some little boy in prison.

J.A. 13-14. Later in his argument, while reviewing the list of mitigating circumstances submitted by the defense for the jury's consideration, the prosecutor noted that Skipper claimed to have "'shown significant and positive adjustments to confinement, and education and employment skills that enable him to be a stable and productive prisoner.'" The prosecutor responded to this assertion by recalling the one instance of Skipper's misconduct in pretrial confinement to which he had admitted on cross-examination, and suggested that this incident revealed his likely future conduct in prison:

> Didn't he admit kicking on the bars over there? That's the kind of prisorer he is. Kicking on the bar. Kicking on the bars . . .

J.A. 14.

After hearing arguments of counsel and the judge's sentencing charge, the jury deliberated about ninety minutes before returning a binding recommendation of death.

On appeal to the South Carolina Supreme Court, Skipper alleged, *inter alia*, that the trial court's exclusion of the mitigation testimony of the jail guards and of Mrs. Henry concerning petitioner's good adjustment to confinement during the eight months between his arrest and his trial violated the eighth amendment principle enunciated in *Lockett* v. *Ohio*, 438 U.S. 586 (1978). *State* v. *Skipper*, Brief of Appellant at 54-57. The South Carolina Supreme Court rejected this argument, and affirmed

petitioner's convictions and death sentence. The state supreme court's response to his *Lockett* argument, in its entirety, consisted of the following:

> Next, Appellant charges error in the refusal of the trial judge to permit testimony of Appellant's adjustment to prison life. We disagree.
>
> The trial judge properly refused to admit evidence of Appellant's *future* adaptability to prison life. *State* v. *Koon*, [278 S.C. 578, 298 S.E.2d 769 (1982)]. However, evidence of his past adaptability was admitted through testimony of his former wife, his mother and his own testimony. This contention is without merit.

State v. *Skipper*, ___ S.C. ___, 328 S.E.2d 58, 61-62 (1985); J.A. at 21 (emphasis in original).

Following denial of a timely petition for rehearing, petitioner sought review in this Court on the basis of two alleged deprivations of his federal constitutional rights. First, he asserted that the South Carolina courts' exclusion of evidence of his non-dangerousness in prison violated the eighth amendment principle of *Lockett* v. *Ohio*, 438 U.S. 586 (1978), by excluding relevant evidence in mitigation of his punishment. Secondly, he asserted that to the extent that the South Carolina Supreme Court had recognized the presence of constitutional error in the exclusion of mitigating evidence in his sentencing proceeding, it had violated the federal constitutional harmless error rule of *Chapman* v. *California*, 386 U.S. 18 (1967), in affirming his death sentence. On October 15, 1985, the Court granted certiorari limited to the first of these questions.

SUMMARY OF ARGUMENT

South Carolina recognizes the relevance of a capital defendant's future dangerousness to the sentencing

determination. Nevertheless, it has steadfastly refused to acknowledge the relevance, as a mitigating factor, of evidence of a defendant's character or prior record that shows that the defendant would probably prove nonviolent and cooperative in a prison environment if his life is spared. This prohibition violates the requirement of the eighth amendment expressed in *Lockett* v. *Ohio* that a capital sentencer may not be prohibited from considering in mitigation any relevant aspect of the defendant's character or record. In addition, because the state in this case sought to prove that petitioner would actually be dangerous in prison unless executed, while barring petitioner from responding with readily available evidence to the contrary, the death sentence imposed here violated well-settled due process principles.

ARGUMENT

I. South Carolina's Limitation On Mitigating Evidence.

The issue presented by petitioner's case is this: may a state prevent a capital defendant from attempting to persuade the sentencing jury, by competent evidence, that society would have nothing to fear from allowing him to live out his life in prison?

The pertinent South Carolina law is clear. Several months before petitioner's trial, the South Carolina Supreme Court approved the admission, in a capital sentencing proceeding, of psychiatric predictions that the defendant posed a danger of further acts of violence if he was permitted to live. *State* v. *Woomer*, 278 S.C. 468, 299 S.E.2d 317, 319-320 (1982), *cert. denied*, 463 U.S. 1229 (1983); *see also*, *State* v. *Plath*, 281 S.C. 1, 313 S.E.2d 619, 627, *cert. denied*, 104 S.Ct. 3560 (1984). Thus, the prosecutor's vigorous efforts to persuade the jury in this case that petitioner was an unruly prisoner who would proba-

bly rape other inmates if sent to prison for life were addressed to a sentencing consideration—the defendant's future dangerousness—which South Carolina law recognizes as relevant. But at the same time as South Carolina law places a capital defendant's future dangerousness in issue, it labels as irrelevant and inadmissible much of the evidence with which a capital defendant might attempt to meet the state's proof. For on the very same day that it decided *State* v. *Woomer*, the South Carolina Supreme Court declared in *State* v. *Koon*, 278 S.C. 528, 298 S.E.2d 769 (1982) (*Koon I*), that the likely future good conduct of a convicted murder in prison was not a valid consideration for a capital sentencing jury in deciding whether to impose a sentence of death or of life imprisonment.

The South Carolina court's explanation of this rule—much of which was incorporated verbatim in the trial judge's ruling in this case—was as follows:

> The penalty phase of a capital murder trial is concerned with the existence or nonexistence of mitigating or aggravating circumstances, not the convicted murderer's adaptability to prison life. The jury is concerned with the circumstances of the crime and the characteristics of the individual defendant as they bear logical relevance to the crime. In *Lockett* v. *Ohio*, cited as controlling in *Eddings* v. *Oklahoma*, the United States Supreme Court retained the court's traditional authority to exclude irrelevant evidence which did not bear on a defendant's character, prior record, or the circumstances of his offense. We conclude that the evidence of appellant's future conformity to prison life was properly excluded as irrelevant.

298 S.E.2d at 773-774.

South Carolina modified this rule some ten months after petitioner's trial to permit evidence of *past* good

conduct in jail or prison as proof of a defendant's general character. *State* v. *Koon*, ___ S.C. ___, 328 S.E.2d 625 (1984), *cert. denied*, 105 S.Ct. 2056 (1985) (*Koon II*). But it has steadfastly adhered to its conclusion, first expressed in *Koon I*, that a convicted murderer's probable future good conduct in prison was irrelevant and inadmissible. *State* v. *Stewart*, 283 S.C. 104, 320 S.E.2d 447, 450 (1984); *State* v. *Patterson*, ___ S.C. ___, 327 S.E.2d 650, 653 (1984), *cert. denied*, 105 S.Ct. 2056 (1985), *State* v. *Chaffee*, ___ S.C. ___, 328 S.E.2d 464, 471 (1984), *cert. denied*, 105 S.Ct. 1878 (1985), *State* v. *Elmore*, Opinion No. 22322 (S.C., May 16, 1985), *petition for cert. filed*, July 10, 1985 (No. 85-5087).[3] In no case since *Koon I*,

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[3] The practical significance of this seemingly rather arcane distinction is that it has permitted the South Carolina court to affirm almost every death sentence in which evidence of a capital defendant's past good conduct in jail or prison was erroneously excluded. *Koon II*, *supra*, *State* v. *Patterson*, *supra*, *State* v. *Elmore*, *supra*, *State* v. *Plemmons*, Opinion No. 22338 (S.C., June 3, 1985), petition for cert. filed, September 12, 1985 (No. 85-5411). The state court's reasoning in the majority of these cases was that since the erroneously excluded testimony concerning the defendant's good conduct in prison was relevant only insofar as it bore on his general character, the excluded evidence would have been "cumulative" to whatever other evidence of good character was admitted for the jury's consideration. Thus, for example, the court in *State* v. *Patterson*, *supra*, found that the erroneous exclusion of the defendant's excellent prison record over a period of nearly three years following his arrest did not require reversal because the evidence would have been cumulative to the testimony of several close family members, a neighbor and a minister concerning the defendant's good behavior as a child, and of an employer for whom the defendant had worked for a few months prior to his arrest. 327 S.E.2d at 653-654. Only in one case has the South Carolina court found the exclusion of evidence of past good behavior in jail to require reversal of a death sentence, and in that case the defendant had offered no other evidence in mitigation whatsoever, thus precluding a finding that his jail record would have been "cumulative" to other evidence of good character. *State* v. *Stewart*, 283 S.C. 104, 320 S.E.2d 447, 450 (1984).

moreover, has the South Carolina court made any effort to reconcile the holding of that case with any of this Court's death penalty decisions. For the reasons that follow, petitioner submits that such a reconcilation cannot be made.

II. The Rule Of *State* v. *Koon* Violates The Eighth Amendment Principles Of *Lockett*, *Jurek* And *Ramos*.

The South Carolina Supreme Court's blanket prohibition of evidence of a capital defendant's probable good conduct in confinement violates the eighth amendment principle that a capital sentencing authority "must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should *not* be imposed." *Jurek* v. *Texas*, 428 U.S. 262, 271 (1976) (emphasis added). Elaborating on this principle in *Woodson* v. *North Carolina*, 428 U.S. 280 (1976), the joint opinion of Justices Stewart, Powell and Stevens made clear that "the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender . . . as a constitutionally indispensible part of the process of inflicting the penalty of death." *Id.* at 304. Two years later, a plurality of the Court explicitly held that a state legislature may not restrict the relevant mitigating circumstances which a capital defendant may place before the sentencer as reasons why his life should be spared. Writing for the plurality in *Lockett* v. *Ohio*, 438 U.S. 586 (1978), the Chief Justice explicated the eighth amendment principles of *Jurek* and *Woodson* as requiring

> that the sentencer, in all but the rarest kind of capital case, not be precluded from considering *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

Id. at 604 (emphasis in original). The *Lockett* plurality opinion continued:

> [A] statute that prevents the sentencer in all capital cases from giving independent weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments.

Id. at 605. Since *Lockett*, a majority of the Court has repeatedly reaffirmed the requirement "'that there be taken into account the circumstances of the offense together with the character and propensities of the offender.'" *Eddings* v. *Oklahoma*, 455 U.S. 104, 112 (1982), quoting *Pennsylvania* v. *Ashe*, 302 U.S. 51, 55 (1937); *California* v. *Ramos*, 463 U.S. 992, 1000-1001 (1983); *and see Enmund* v. *Florida*, 458 U.S. 782, 827-829 (1982) (O'Connor, J. dissenting); *Caldwell* v. *Mississippi*, ___ U.S. ___, 105 S.Ct. 2633, 2650-2651 (1985) (Rehnquist, J., dissenting) ("capital sentencing juries must be allowed to consider all forms of mitigating evidence so as to facilitate individualized and rational determinations of the appropriateness of capital punishment").

While the South Carolina Supreme Court has accepted the *Lockett* principle in other contexts, *State* v. *Linder*, 276 S.C. 304, 278 S.E.2d 335, 339 (1981) (jury instructions must permit consideration of nonstatutory mitigating circumstances), it attempted to evade it here simply by declaring the question of a capital defendant's likely future behavior in prison to be "irrelevant" to the sentencing decision. *Koon I*, *supra*, 298 S.E.2d at 773. In so doing, the South Carolina court purported to rely on

Lockett's recognition of "the authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense." *Id.*, *citing Lockett* v. *Ohio*, 438 U.S. at 604, n.12.

In cases subsequent to *Koon I*, moreover, the South Carolina court has suggested several additional rationales in support of its decision to bar capital defendants from presenting evidence of their likely future good behavior in prison. In *State* v. *Chaffee*, *supra*, the court seemed to suggest—in plain disregard of *Lockett*—that the issue of future conduct in prison was inadmissible because it was not included in the list of statutory mitigating circumstances in South Carolina's capital sentencing statute.[4] On another occasion, the state court defended its ruling in *Koon I* by stressing "the lack of logical connection between adaptability to confinement and the specific personality traits which were instrumental in leading the defendant to commit the crime at issue." *State* v. *Plath*, 281 S.C.1, 313 S.E.2d 619, 627, *cert. denied*, 104 S.Ct. 3560 (1984).[5]

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[4] Upholding the exclusion in *Chaffee* of psychiatric testimony concerning the adaptability of the defendant to the environment of prison life, the court stated:

> From a reading of the mitigating circumstances enumerated in the Code relating to the punishment for murder, it is obvious that the Legislature never intended that the judge and/or the jury gaze into the crystal ball and attempt to speculate on whether or not the prisoner would or would not conduct himself properly in prison. We find no error.

328 S.E.2d at 471.

[5] In *Plath*, the court acknowledged that South Carolina law permits the prosecution to introduce evidence of a capital defendant's future dangerousness in aggravation of his punishment, *State* v. *Woomer*, 278 S.C. 468, 299 S.E.2d 317 (1982), *cert. denied*, 463 U.S. 1229 (1983), while prohibiting the defense from presenting "testi-

South Carolina's extremely restrictive treatment of relevance under *Lockett* cannot be sustained because it is contrary to *Lockett* itself. For the mitigating factor that South Carolina has designated as irrelevant—the adaptability and likely future good conduct of an individual defendant in prison—is itself an aspect of the defendant's "character' that petitioner sought to prove here by evidence of his "record," as each of those terms is employed in *Lockett*. In reality, South Carolina has designated an aspect of petitioner's character—his capacity for living peacefully and even constructively in confinement—as irrelevant to the question of whether his life should be taken or spared. It was precisely because Ohio had created such an arbitrary prohibition against consideration of logically relevant aspects of the defendant's background and prospects for rehabilitation, as well as of mitigating aspects of the offense, that this Court struck down the Ohio death sentencing statute in *Lockett*. The constitutional defect here is of the same kind.

Indeed, South Carolina's exclusion of evidence concerning a capital defendant's future good conduct in confinement violates the rule of *Lockett* in an especially mis-

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mony about a defendant's potential adjustment to the controlled environment of life imprisonment." Although the court in *Plath* justified this seeming contradiction on the basis of the reasoning quoted in text, it conceded that the dividing line between these two types of evidence "is fine indeed." *Id.* at 627. In fact, by adopting a view of "relevancy" which designates a defendant's future dangerousness as relevant and his future nondangerousness in prison as irrelevant because only the former bears a "logical connection . . . to specific personality traits which were instrumental in leading the defendant to commit the crime," the South Carolina court has come dangerously close to defining as relevant only a defendant's bad characteristics—that is, those which made him into a murderer—while excluding any evidence of peaceful or redeeming qualities.

chievous way. This is so because it excludes probative evidence on an issue—the defendant's likely future conduct if he remains alive in prison—that a capital jury is almost certain to consider in its sentencing deliberations. Whether state law requires such consideration, *Jurek* v. *Texas*, 428 U.S. 262 (1976), encourages it, *California* v. *Ramos*, 463 U.S. 992, 1003 (1983), or merely permits it, *State* v. *Woomer*, 278 S.C. 468, 299 S.E.2d 317 (1982), in virtually every capital case the very fact that the defendant has been convicted of committing an aggravated murder naturally focuses the sentencing jury's attention on whether he is likely to commit further acts of violence unless executed. A jury attempting to discharge its legal and moral responsibility to the community will confront this difficult question in its deliberations, and will resolve it as accurately and fairly as possible.[6] Thus by excluding

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[6] As the Court has recently observed, our system of law presumes that capital juries address "'the truly awesome responsibility of decreeing death for a fellow human being . . . with due regard for the consequences of their decision.'" *Caldwell* v. *Mississippi*, ____ U.S. ____, 105 S.Ct. 2633, 2640 (1985), quoting *McGautha* v. *California*, 402 U.S. 183, 208 (1971). In assessing these consequences, jurors must draw on their own life experiences, and their personal moral, factual and legal judgment. *Barclay* v. *Florida*, 463 U.S. 939, 950 (1983) (plurality opinion). Recent public opinion survey research shows that Americans' support for the death penalty—and thus, to a substantial degree, the sentencing criteria of American jurors—is primarily based on concern over the danger of further acts of violence by convicted murderers. A nationwide survey by the Associated Press/Media General Poll reported earlier this year that a 42 percent plurality of death penalty supporters stated that the most important justification for capital punishment is "to protect society from future crimes that [the convicted murderer] might commit." By contrast, only 31 percent of respondents listed general deterrence as the primary purpose for the death penalty, while 17 percent cited punishment of the particular offender as the most important justification.

as "irrelevant" a defendant's proof that he would pose no further danger to society if confined for life, South Carolina has not removed the issue of his future conduct from the jury's consideration. All it has done is to create a wholly unnecessary risk that the jury's resolution of this issue will be based on incomplete and even misleading information, and that the defendant will therefore be sentenced to death in error. That is precisely what *Lockett* forbids. And that is what happened in this case.

Petitioner's argument is underscored by this Court's frequent recognition of the logical relevance of a defendant's future conduct as a consideration in capital sentencing. That a jury may consider a defendant's probable future behavior was settled beyond peradventure in *Jurek* v. *Texas*, 428 U.S. 262 (1976), where the Court upheld against eighth amendment challenge a state statute which placed the future conduct of the convicted murderer at the very center of the jury's sentencing deliberations. More recently, in *Barefoot* v. *Estelle*, 463 U.S. 880 (1983), the Court reiterated that "the likelihood of a defendant's committing further crimes is a constitutionally

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P. Harris, Public Attitudes Toward the Penalty of Death, Paper Presented at the Annual Conference of the American Society of Criminology, San Diego, Cal., Nov. 16, 1985; "Despite Fairness Issue, Death Penalty Support Rising," Rochester Times-Union, Jan. 29, 1985, at 1A. Such views concerning the value of the death penalty as a means of incapacitating dangerous offenders can provide an entirely appropriate framework for capital sentencing. *Jurek* v. *Texas*, 428 U.S. 262 (1976). But no such theoretical justification for capital punishment may serve as a reason to treat each convicted murderer as a member "of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death," *Woodson* v. *North Carolina*, 428 U.S. 280, 304 (1976), without regard to whether the individual defendant on trial actually poses a danger of further violence.

acceptable criterion for imposing the death penalty." *Id.* at 896. *Accord, California* v. *Ramos*, 463 U.S. 992 (1983); *Spaziano* v. *Florida*, ___ U.S. ___, 104 S.Ct. 3154, 3163 (1984) (incapacitation of the offender is a legitimate consideration in capital sentencing). While the Court has stressed that a capital defendant's future behavior may be established in many different ways, *e.g.*, *Jurek* v. *Texas*, *supra*, (reputation in the community); *Barefoot* v. *Estelle*, *supra* at 896-906, (psychiatric prediction of future dangerousness); *Eddings* v. *Oklahoma*, 455 U.S. 104, 107-108 (1982) (psychiatric evidence that defendant might outgrow or be cured of personality disorder), the logical relevance of that future behavior, whether good or bad, is no longer open to question. Thus where, as here, evidence of a defendant's character and record suggests that his future behavior will be good, that evidence simply cannot be excluded as "irrelevant" without violating *Lockett*.[7]

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[7] Nor is the issue here affected by the fact that adaptability to confinement is only logically relevant so long as the defendant remains confined within "the controlled environment of life imprisonment." *State* v. *Plath*, 281 S.C. 1, 313 S.E.2d 619, 627 (1984). While this is obviously true it does not eliminate the relevance of the defendant's probable future conduct in prison. If the sentencing jury was being asked to choose between sentencing the defendant to death and releasing him into society, one might argue that the jury need not consider how he might conduct himself in prison. But the jury's actual choice is between sentencing the defendant to death and sending him to prison for many years or for life. In South Carolina, every convicted murderer not sentenced to death must be sentenced to life imprisonment, and may not be considered for parole release until he has served at least twenty years. S.C. Code § 16-3-20(A) (1984 Cum. Supp.). If the very remote possibility of a life prisoner's eventual release from confinement is a logical consideration in capital sentencing, *California* v. *Ramos*, 463 U.S. 992 (1983), the same must necessarily be said of his behavior during the course of an incarceration which is absolutely certain to occur should the defendant be

Petitioner does not, of course, suggest that his future conduct, whether in prison or out, is the only consideration relevant to sentencing. Nor does he argue that in assessing his future conduct, a sentencing jury may not consider his likely behavior in society as well as inside prison. *California* v. *Ramos*, *supra*, 463 U.S. at 1003. Indeed, evidence which tended to prove that petitioner would behave nonviolently and co-operatively in *any* future environment might be especially persuasive to a sentencing jury as a reason to spare his life. *See Lockett* v. *Ohio*, *supra*, 438 U.S. at 594 (favorable psychiatric prognosis for rehabilitation if defendant is returned to society). But all of this only states the obvious fact that there are many types of mitigating evidence, and suggests no reason why the evidence which Ronald Skipper actually offered at his trial—his adaptability and probable good behavior in prison—should have been kept from the jury charged with deciding his fate.

As pointed out above, the eighth amendment establishes the right of a capital defendant to offer and have considered by the sentencer any relevant evidence in mitigation of his punishment. *Lockett* itself makes clear, however, that each state retains control over the admission of evidence relevant to the proof of mitigating circumstances. *Id.* at 604, n.12. Thus where evidence can reasonably be regarded as irrelevant to the proof of a mitigating circumstance, nothing in *Lockett* or in petitioner's argument here would draw into question the right of a state court to exclude the evidence. For example, had

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sentenced to life imprisonment. Because a capital defendant's future dangerousness or nondangerousness is so largely a question of his likely future conduct *in prison*, the relevance of his institutional conduct in prison is obvious.

the trial judge here admitted the testimony of the witnesses proffered by petitioner to establish his adaptability to prison, *Lockett* would not have prevented the court from excluding identical testimony from numerous additional witnesses. *Cobb* v. *State*, 244 Ga. 344, 260 S.E.2d 60, 71 (1979) (*Lockett* and state law do "not imply . . . that the judge, in his discretion and inherent power to control the progress of trials, cannot limit the introduction of an endless quantity of cumulative testimony."). Similarly, the state court could properly have excluded incompetent opinion evidence concerning the defendant's likely future good behavior. *State* v. *Pinch*, 306 N.C. 1, 292 S.E.2d 203, 220, n.12, *cert. denied*, 459 U.S. 1056 (1982). Nor would *Lockett* be violated by the exclusion of evidence that another convicted murderer had made a successful and nonviolent adjustment to prison, where such evidence would have borne no relevance to *petitioner's* character or record.[8] *Lockett*, in sum, did not affect the states' authority to determine whether a particular item of evidence is relevant to the proof of a mitigating factor offered by a defendant in a capital case. What *Lockett* did establish was simply that a state cannot designate as "irrelevant" and inadmissible the mitigating factor itself.

It is significant that petitioner's position does not appear to have been so much as questioned in the large majority of capital punishment jurisdictions. So far as

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[8] For similar reasons, state and federal courts have held that *Lockett* does not require sentencing juries to consider testimony concerning religious objections to the infliction of capital punishment in all cases, *State* v. *Watson*, 449 So.2d 1321 (La. 1984), or describing the process of death by electrocution. *Shriner* v. *Wainwright*, 715 F.2d 1452, 1456 (11th Cir. 1983), *cert. denied*, ____ U.S. ____, 104 S.Ct. 1328 (1984).

petitioner is aware, only one state besides South Carolina has upheld the exclusion of mitigating evidence of a defendant's likely future good conduct in prison, *State* v. *Pinch*, 306 N.C. 1, 292 S.E.2d 203, 220, *cert. denied*, 459 U.S. 1056 (1982), and in that case the North Carolina court's decision rested upon the alternate ground that the psychiatric opinion evidence proffered on the issue lacked an adequate foundation.[9] By contrast, the handful of other state supreme courts to have touched on this issue have uniformly assumed the relevance of competent evidence of a defendant's good conduct in prison. *State* v. *Watson*, 129 Ariz. 60, 628 P.2d 943, 945-6 (1981) (reducing death sentence to life imprisonment due in part to defendant's excellent prison record); *Delap* v. *State*, 440 So.2d 1242, 1257 (Fla. 1983) (defendant's conduct on death row prior to resentencing considered as mitigating circumstance); *Jordan* v. *State*, 464 So.2d 475, 484-486 (Miss.), *petition for cert. filed*, 54 U.S.L.W. 3004 (U.S. May 13, 1985) (No. 84-1783) (good conduct on death row prior to retrial);[10]

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[9] In view of this defect in the *Pinch* record, and since *Pinch* was decided before this Court's decisions in *California* v. *Ramos*, *supra*, and *Barefoot* v. *Estelle*, *supra*, it is difficult to say whether North Carolina would continue to question the relevancy of a defendant's likely future prison conduct if the issue were again raised upon an adequate record.

[10] Petitioner must concede that the basis of the Mississippi court's 5-4 decision in *Jordan* is by no means clear, since the majority approved the admission of some evidence of the defendant's good conduct in prison while upholding the exclusion of other very similar evidence. Whatever the merits of the Mississippi court's ultimate resolution of Jordan's *Lockett* claims, *see id.*, 464 So.2d at 486-491 (Robertson, J., dissenting), the majority opinion in *Jordan* does appear to acknowledge the legal relevancy, under *Lockett*, of a capital defendant's good conduct in prison as a mitigating circumstance. *Id.*, 464 So.2d at 484-485.

State v. *Sheffield*, 676 S.W.2d 542, 553 (Tenn. 1984) (mitigation testimony by law enforcement officers about defendant's conduct since his incarceration was "clearly admissible," citing *Lockett*); *see also State* v. *Teague*, 680 S.W.2d 785, 787 (Tenn. 1984) (evidence of defendant's adjustment to prison routine and good conduct in prison admitted in mitigation). Thus, it does not appear that any jurisdiction in the United States other than South Carolina has squarely rejected the future good conduct of a capital defendant in prison as a mitigating circumstance, while most of those states to have considered the question have recognized the logical and legal relevance of that issue to the capital sentencing decision. *Cf. Woodson* v. *North Carolina*, 428 U.S. 280, 291-295 (1976) (joint opinion of Stewart, Powell and Stevens, JJ.) (states' capital sentencing practices as index of eighth amendment values).

If any further proof were needed of the logical relevance of a defendant's future good behavior in prison to a capital jury's sentencing decision, it was provided in this case by the prosecutor's efforts to persuade the sentencing jury that petitioner had in fact been badly behaved in jail and would probably rape other inmates in prison unless executed. J.A. 14. Of course, the trial judge's ruling excluding virtually all of petitioner's evidence on this point deprived petitioner of any opportunity to rebut these assertions. But quite apart from the fundamental unfairness of the prosecutor's argument under such circumstances, a matter which is discussed *infra* at 25-28, his remarks clearly concede the relevance of petitioner's future conduct in prison as a sentencing consideration.[11]

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[11] A somewhat similar acknowledgment is implicit in South Carolina's authorization of psychiatric predictions of capital defendants'

The error committed here requires that petitioner be resentenced. Because a capital sentencing jury "is free to consider a myriad of factors to determine whether death is the appropriate punishment," *California* v. *Ramos*, 463 U.S. 992, 1008 (1983), a precise evaluation of the impact of constitutional error on the sentencing process is normally impossible. *See*, *Gardner* v. *Florida*, 430 U.S. 349, 364 (1977). Rather, when this Court has determined that a capital sentencer has failed to consider all of the relevant mitigating evidence before imposing a sentence of death, it has recognized that the resulting risk of error requires resentencing. *Eddings* v. *Oklahoma*, 455 U.S. 104, 117 (1982) (O'Connor, J., concurring).

III. Under The Circumstances Of This Case, South Carolina's Refusal To Allow Petitioner To Rebut The State's Assertions Of His Bad Conduct And Future Dangerousness In Confinement Was Fundamentally Unfair.

Petitioner has argued here that under settled principles of eighth amendment jurisprudence from *Jurek* v. *Texas*, 428 U.S. 262 (1976) through *Lockett* v. *Ohio*, 438 U.S. 586 (1978) and *Eddings* v. *Oklahoma*, 455 U.S. 104 (1982) to *California* v. *Ramos*, 463 U.S. 992 (1983) and *Barefoot* v. *Estelle*, 463 U.S. 880 (1983), a state may not exclude as "irrelevant" to the capital sentencing decision evidence of a defendant's character or record which is offered to show that he will prove to be co-operative and nonviolent in prison if his life is spared. But the process by

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likely future *dangerousness*, when such evidence is offered by the prosecution in aggravation of a capital defendant's punishment. *State* v. *Woomer*, 278 S.C. 468, 299 S.E.2d 317 (1982), *cert. denied*, 463 U.S. 1229 (1983); *and see State* v. *Copeland*, 278 S.C. 572, 300 S.E.2d 63, 76-77 (1982), *cert. denied*, 460 U.S. 1103 (1983) (opining that jury imposed death sentence on basis of psychologist's unfavorable prognosis concerning defendant's future conduct; sentence affirmed).

which South Carolina condemned Ronald Skipper to die was unfair and unconstitutional for yet another reason. Even if the states were to be permitted, despite *Lockett*, to designate as "irrelevant" mitigating factors which have traditionally been deemed central to the sentencing decision, the fact remains that both South Carolina law and the prosecution at Ronald Skipper's trial placed his future dangerousness in issue before the sentencing jury. All that was excluded at this sentencing hearing was Ronald Skipper's side of the story.

As noted in the Statement, the trial judge permitted the prosecutor to elicit from petitioner an admission concerning one isolated act of misconduct in pretrial confinement. When petitioner tried to meet this evidence of bad conduct by establishing, through the testimony of his jailers, that his conduct in pretrial confinement had actually been good, the trial judge invoked the rule of *State* v. *Koon* to prevent the jury from hearing this testimony. Then the solicitor argued to the jury that petitioner's one act of misconduct revealed his character and showed "the kind of prisoner" he would make. In addition, the prosecutor urged the jury to assume—on the basis of evidence that petitioner had been the *victim* of a homosexual gang rape in prison—that he had actually been the rapist and would rape other prisoners unless he was executed. Of course, when he made this emotional and seemingly persuasive argument, the prosecutor knew that the jail officials who had actually supervised petitioner in pretrial confinement for the better part of the past year were at the courthouse prepared to testify to petitioner's good conduct and adaptability to prison. But the jurors were not permitted to hear or consider this information, even though they could not have been expected to make an accurate evaluation of the prosecution's argument without it.

Under such circumstances, the procedure followed in this case plainly violated petitioner's fundamental right to present witnesses in his own defense. *Chambers* v. *Mississippi*, 410 U.S. 284, 302 (1973); *Green* v. *Georgia*, 442 U.S. 95 (1979). Once the state had made an issue of petitioner's past and likely future conduct in prison, there can be absolutely no justification for the trial court's refusal to permit petitioner to rebut the state's assertions by competent evidence.

In the capital sentencing context, this elementary precept of due process is embraced by the eighth amendment principle that the sentencer "must be allowed to consider on the basis of all relevant information not only why a death sentence should be imposed but also why it should not be imposed." *Jurek* v. *Texas*, 428 U.S. 262, 271 (1976). In considering the admissibility of prosecution efforts to prove a capital defendant's future dangerousness, the Court has paid particular attention to whether the defendant has been afforded a fair opportunity to reply. *Ake* v. *Oklahoma*, ___ U.S. ___, 105 S.Ct. 1087, 1097 (1985); *Barefoot* v. *Estelle*, 463 U.S. 880, 898 (1983) (admission of evidence in American legal system based on assumption that factfinder will "have the benefit . . . of contrary evidence by the opposing party"). By denying petitioner such an opportunity in this case, the state compounded the already unacceptable risk "that the death penalty [would] be imposed in spite of factors which may call for a less severe penalty." *Lockett* v. *Ohio*, 438 U.S. 586, 605 (1978).

Gardner v. *Florida*, 430 U.S. 349 (1977) expresses the Court's recognition of the fundamental nature of the right of rebuttal in a way which is especially germane here. In *Gardner*, the Court vacated a death sentence because the trial judge had imposed it after considering a confidential

presentence report which the defendant had not been permitted to rebut. The *Gardner* record did not reveal what was in the presentence report, nor whether the trial judge had been adversely influenced by it: the Court reversed "[b]ecause of the *potential* that the sentencer *might* have rested its decision in part on erroneous or inaccurate information that the defendant had no opportunity to explain or deny." *California* v. *Ramos*, 463 U.S. 992, 1004 (1983) (emphasis added).

What might have happened in *Gardner* manifestly did happen here. The prosecution was permitted to prove that Ronald Skipper would pose a danger in prison, and he was not permitted to respond.

As *Gardner* makes clear, no death sentence imposed in such a manner may be carried out. This case shows why. The murder of which petitioner was convicted involved no weapon and was not shown to have been premeditated. In mitigation, petitioner showed the ravages of a childhood of abuse and domestic violence. The facts of this case may well have rendered the jury's sentencing decision a close and difficult one. In such a case, the incremental effect of the prosecutor's predictions concerning petitioner's probable violent conduct in prison may have been the difference between life and death. For this reason, petitioner must be resentenced by a jury which has been permitted to hear and consider the evidence on both sides of this question, as well any other aspects of his character and record offered as a basis for a sentence less than death. *Lockett* v. *Ohio*, 438 U.S. 586, 605 (1978).

CONCLUSION

For the foregoing reasons, petitioner submits that his sentence of death should be reversed, and his case remanded for resentencing.

Respectfully submitted,

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